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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 6

AL HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOSES POLAKOFF
Counsel for Petitioner
475 Fifth Avenue
New York 17, New York

DANIEL H. GREENBERG
Of Counsel

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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No.

AL HARRIS,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Al Harris prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 22, 1964.

Opinion Below

The opinion of the Court of Appeals in this case is reported at 334 F. 2d 460. This opinion is set forth as Appendix A, hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on July 22, 1964. A timely petition for rehearing was denied on August 25, 1964. The jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1). See Appendix B, *infra.*

Questions Presented

1. Whether the immunity provisions of one statute may be used to compel a witness to testify when in fact the subject matter under investigation concerns a violation for which no immunity may be granted.

2. Whether petitioner was afforded a proper and fair hearing for criminal contempt under Rule 42 (a) Federal Rules of Criminal Procedure and whether *Brown* v. *United States*, 359 U.S. 41 should be reconsidered and overruled by this Court.

3. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt where he has been sentenced to one year's imprisonment.

4. Whether the sentence of one year's imprisonment imposed against petitioner in a summary contempt proceeding is constitutionally permissible.

Constitutional Provisions, Statutes and Rule Involved

The pertinent constitutional provisions, statutes and rule involved in this case are set forth in Appendix C, *infra*.

Statement of the Case

The Nature of the Proceedings

Petitioner Al Harris was convicted of criminal contempt of court and sentenced to one year's imprisonment, under Rule 42 (a), Federal Rules of Criminal Procedure, by summary disposition, for a contempt allegedly committed in the presence of the court. On August 8, 1963, petitioner was

brought before District Judge Edward C. McLean, in the District Court for the Southern District of New York, on oral motion of respondent to punish petitioner for wilful refusal to answer questions before a grand jury. The district judge had petitioner sworn as a witness and then, in the presence of the grand jury, and under a purported grant of immunity, put to him the questions petitioner had refused to answer before the grand jury. Upon petitioner's refusal to answer the same questions posed by the judge, he was thereupon immediately held to be in criminal contempt of court and sentenced as aforesaid.

The Record

The record in this case consists of the original typewritten record of proceedings in the district court and printed appendices filed in the court of appeals.

As part of its appendix filed in the court of appeals respondent printed three pages of material (Appellee's Appendix pp. 1a-3a) which did not form part of the proceedings in the district court. Prior to the argument of the appeal before the court of appeals under date of April 3, 1964, petitioner moved in the court of appeals to expunge or strike these pages from respondent's appendix as improper parts of an appendix. When this case was decided in the court of appeals no decision was rendered on petitioner's motion. Thereupon in petitioner's petition for rehearing *en banc* the court of appeals was reminded that it had not decided the pending motion to expunge or strike the offending material. However, on August 26, 1964, the day after the petition for rehearing was denied, the court of appeals denied petitioner's motion to expunge. (See Appendix B, *infra.*)

The Facts

On July 31, 1963, petitioner appeared pursuant to subpoena before a grand jury in the Southern District of New York. While before the grand jury he declined to answer questions put to him by the prosecutor (59a),[1] and he was thereupon brought before District Judge Edward C. McLean. The prosecutor explained to the Judge that they were conducting an investigation into interstate gambling and that one of the questions put to petitioner related to a telephone call to New York from Florida which "while on its face it was a legitimate phone call for lease of premises was really an illegitimate phone call the purpose promoting an unlawful activity, a dice game, in Florida on those premises" (Appellee's Appendix, 4a-5a). Since petitioner had no lawyer at that time the matter was adjourned to the next day to enable him to obtain counsel (Appellee's Appendix, 7a). The following day petitioner appeared before Judge McLean with counsel. At this time it appeared that the subpoena served upon him had noted that the subject matter under investigation before the grand jury involved an alleged violation of the general conspiracy statute (Title 18, United States Code § 371) (61a-65a). The prosecutor stated to the court that the investigation covered violations of the Federal Communications Act "and also into alleged violations of Title 18, United States Code § 1952, which is the general racketeering and gambling section" (61a). The prosecutor informed the court that it was proposed to grant petitioner immunity from prosecution under the immunity provisions of the Federal Communications Act (Title 47, United States Code, § 409(*l*) (62a-63a).

---

[1] All numbers in parentheses refer to Appellant's Appendix in the court of appeals, unless otherwise indicated.

The district judge refused to direct petitioner to answer the questions before the grand jury, on the ground that it did not appear from the questions that the investigation involved a violation of the Federal Communications Act, under which immunity is granted. He thereupon dismissed the proceeding, suggesting to the prosecutor that he start anew and lay a proper foundation for granting petitioner immunity, and issue a new subpoena for this purpose (73a-74a).

A new subpoena was thereupon served upon petitioner containing a designation that the alleged violation under investigation concerned Title 47, United States Code §§ 501 and 203(c) (20a). On August 7, 1963, petitioner appeared before the grand jury and declined to answer the questions put to him, invoking his constitutional privilege against self-incrimination. The questions asked petitioner on this occasion were identical to those asked on his first appearance before the grand jury. These questions concerned petitioner's participation in or knowledge of a dice game in Florida. The sole question relating to a telephone call concerned whether petitioner knew if John Manarite had made a telephone call in January or February, 1963, from Miami, Florida to Flushing, New York, in connection with the leasing of premises in Ojus, Florida, for conducting a dice game (21a-22a). Petitioner declined to answer all the questions, although he was purportedly granted immunity from prosecution for answering them (21a).

Petitioner was then brought again before Judge McLean, accompanied by the grand jury. After some discussion among the judge, the prosecutor and petitioner's counsel, the matter was adjourned until the next day (19a). The next day (August 8, 1963) petitioner again appeared before

the grand jury and the court, with his attorney, in secret session (27a). At the request of the prosecutor the court directed petitioner to answer the questions before the grand jury (29a). Thereupon, both the judge and petitioner's counsel left the courtroom (29a).

Petitioner again refused to answer the questions before the grand jury. The judge and petitioner's counsel reentered the courtroom. At the prosecutor's request, the grand jury stenographer was called as a witness. She read the questions petitioner had refused to answer. These were virtually identical to those which the court had refused to direct him to answer on August 1, 1963. The judge thereupon had petitioner re-sworn as a witness and he put the questions to petitioner, which petitioner continued to refuse to answer (37a-40a). The prosecutor asked the court to hold petitioner in contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure (40a). Thereupon, the following colloquy occurred between petitioner's counsel and the court:

> "Mr. Polakoff: Your Honor, if this is a contempt proceeding I respectfully request an adjournment. I want to have the minutes and I want to have an opportunity to discuss them and consider them with my client and to look up the law.
>
> I further request, your Honor, a hearing where I will be permitted to call witnesses, perhaps a grand juror or two or more; perhaps the places the phone calls allegedly were made as indicated by the assistant, to prove to your Honor that there could be no possible violation of the Communications Act.
>
> I have not been told what tariff has been violated; no law has been cited or rule or regulation to your Honor or to me, and that requires research.

(63) I also would request that the contempt hearing be held in public.

The Court: Your request is denied. This is a contempt committed in open court, and I adjudge the defendant guilty of a criminal contempt rule under Rule 42(a).

This procedure has been followed, as you know, in certain other cases on this subject, and in view of the witness' attitude he is obviously taking a position for the purpose of making a record which he has a perfect right to take. But I have directed him to answer, and he has refused to answer, and that constitutes contempt in the presence of the Court. I see no reason for any further hearing.

Mr. Polakoff: Or a hearing on contempt open to the public?

The Court: This is open to the public.

Mr. Polakoff: This room has been sealed.

The Court: No, this room is not sealed. This is a session of the United States District Court. We opened this court a few minutes ago before we began this proceeding. It is a completely open proceeding.

Now, when I said Mr. Harris had a right to take this position, obviously I am not indicating that (64) I agree with him, but I understand that what he is doing is taking a position so that he can raise a question on appeal. And he has a legal right to preserve his position and raise that question.

I judge Mr. Harris guilty of contempt of court, and I sentence him to imprisonment for a term of one year.

He is remanded to the custody of the marshal." (40a-41a).

Thus petitioner was sentenced by the court, in extreme haste, without being offered the right of personal allocution, and without any pre-sentence report.

Reasons for Granting the Writ

This case is one of those few really important cases involving the use of the contempt power, immunity statutes and the constitutional privilege against self-incrimination. It involves also the requirements for fair hearings and proper sentences in summary contempt cases. The effective administration of federal criminal justice would seem to require review by certiorari of this case.

1. It is clear from the questions put to petitioner at his appearances before the grand jury that the investigation involved an alleged interstate dice game, in possible violation of 18 USC § 1952, which does not contain a witness immunity provision. The sole connection with any communications concerned the question of petitioner's knowledge of the subject matter of a telephone call from Florida to New York. The prosecutor sought to invoke the immunity provisions of the Federal Communications Act (47 USC § 409(*l*) because of his question about this one alleged telephone conversation. On August 1, 1963, the prosecutor requested the district court to direct petitioner to answer all the questions put to him. The court refused to do so, and dismissed the proceeding instead, stating that the questions failed to indicate a violation of the Federal Communications Act; and that no proper foundation had been laid for the invocation of the immunity provisions of this Act.

The judge told the prosecutor to start over again, which he did by merely changing the statutory citation on a subpoena. The court then used the same questions as a basis for holding petitioner in summary contempt. The new subpoena contained the citation of Title 47, United States Code, §§ 203(c) and 501. Section 203(c) provides that no

carrier under the jurisdiction of the Federal Communications Commission shall engage in communications unless a schedule of rates is filed with the commission and that thereafter all charges must conform to such schedule. Section 501 of this title refers to the criminal penalties for violation thereof. Nowhere in Section 501 is it made a crime for a user or customer of the telephone service to violate any regulation promulgated by a carrier. Section 409(*l*) of this title provides that no individual shall be prosecuted for or on account of any transaction which he is compelled to testify after having claimed his privilege against self-incrimination.

Unlike the cases which have preceded this one, here petitioner challenged the materiality of the questions as a basis for claiming a violation of the Federal Communications Act, which would thereby authorize the invocation of its immunity provisions. He sought and was denied a hearing to test whether any violation of the Federal Communications Act was involved and whether the offer of immunity under this statute was merely a guise and subterfuge in the conduct of an investigation under the Anti-Racketeering Act (18 USC § 1952), which does not contain any immunity provisions. *Watkins* v. *United States,* 354 U.S. 178, 208 fn 47; *Brown* v. *United States,* 359 U.S. 41, 42; *Levine* v. *United States,* 362 U.S. 610, 611; *United States* v. *Monica,* 317 U.S. 424; *Heike* v. *United States,* 227 U.S. 131. See *Alexander* v. *United States,* 181 F. 2d 480, where it was held that the immunity provisions of one statute may not be used as a cloak for an investigation really being conducted under another statute.

There are approximately forty-four different immunity statutes in federal law. See 72 Yale Law Journal 1568 (1963), Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading The Constitutional Tightrope,* at p. 1590, fn 100, App. A. at pp. 1611-1612. There are also many hundreds of criminal statutes that do not provide for witness immunity. If the prosecutor's theory in this case is accepted, any telephone call allegedly made in furtherance of any crime would be a violation of the provisions of the Federal Communications Act (47 USC §§ 203(c) and 501). We submit this is not the law and this proposition should be rejected by this Court. In our modern society and culture it is inconceivable that one could do all the things necessary to commit a crime, especially a federal crime, without the use of a telephone at some point. The immunity provisions of the Federal Communications Act were not intended by Congress to be and are not a general immunity statute.

Moreover, the statute invoked by the prosecution here, 47 USC § 203(c), makes it unlawful for the telephone company to charge rates without first filing rate schedules and thereafter to charge rates different than those set forth in said schedules. As the prosecutor pointed out in his statement to the district court on July 31, 1963, the telephone call about which he was inquiring, "on its face was a legitimate phone call for lease of premises" (Appellee's Appendix, pp. 4a-5a). This is not the case of telephones being regularly used to conduct gambling enterprises, as in both the cases of *Marcus* v. *United States,* 372 U.S. 944, and *Testa* v. *United States,* 376 U.S. 931, where certiorari

was denied.[2] We are here dealing with an isolated telephone call which is sought to be used as a basis for transforming the immunity provisions of this statute into a general immunity act.

Not once during the entire proceeding did the prosecutor advise the district court or the petitioner what tariff schedule or regulation allegedly had been violated. Only and for the first time in the court of appeals did the prosecutor state that the investigation involved a violation of General Regulation 9 of the American Telephone and Telegraph Company, Long Lines Tariff, F.C.C. No. 132 and F.C.C. No. 31 of the Southern Bell Telephone and Telegraph Company. In its Appendix in the court of appeals the government only sets forth Regulation 9. However, this is only one of twenty-six regulations which set forth the contractual agreement between the operating company and its subscribers and users of its service.

Moreover, at the hasty summary hearing held in the district court, petitioner's counsel stated that he had "not been told what tariff has been violated; no law has been cited or rule or regulation" (40a). The record in the court below is devoid of any tariff reference or any showing that any pertinent tariff or regulation thereof had been violated by what may have been said during the course of a private telephone conversation. In effect the prosecu-

[2] In his brief in opposition to the petition for certiorari, in the *Marcus* case, the Solicitor General argued that the telephone service in question must be wilfully, knowingly and regularly used for an unlawful purpose to constitute a violation of the Federal Communications Act. In the *Testa* case, the Solicitor General made the same argument. In both cases the records disclosed the regular and frequent use of telephones in gambling enterprises.

tion has attempted to transform what really are the contractural relations between a telephone company and its subscribers or the users of its facilities into some undefined crime. *Cf. Kelly* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 456 (DC ND Ill. 1962) and *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 471 (DC ND Ill. 1962), judgment affirmed, 376 U.S. 782.

Only Congress is empowered to legislate and define crimes. This power is denied to a private company. When the prosecutor handed up to the court of appeals a portion of the general regulations of a tariff of the American Telephone and Telegraph Company, petitioner's counsel objected and moved to expunge such material from respondent's appendix in that court. This is one of the reasons why it is contended that petitioner did not have a proper hearing before the district court in this case.

It is respectfully submitted that the increasing use of the summary contempt power and the expanded use of immunity statutes in criminal investigations require this Court's guidance in the formulation of proper standards for the adjudication of such cases. It is further submitted that the court below erred in holding that the immunity provisions of the Federal Communications Act were applicable to the facts of this case, and accordingly review by certiorari seems warranted.

2. Petitioner was not afforded a proper and fair hearing for criminal contempt under Rule 42(a), Federal Rules of Criminal Procedure. The record in this case makes this abundantly clear. The purported hearing is set forth in full in petitioner's appendix, and the pertinent colloquy between petitioner's counsel and the district court is re-

printed *supra* pp. 6-7. Even under the loose rules of procedure which now govern summary contempt hearings, petitioner did not receive a fair hearing. The questions petitioner's counsel sought to explore and have answered at a proper adversary hearing were foreclosed by the district court's hasty action in summarily adjudging petitioner in contempt and immediately imposing sentence. Petitioner was denied the right to present a defense. Petitioner was even denied the right of personal allocution prior to sentencing in violation of the decisions of this court. (*Green* v. *United States,* 365 U.S. 301; *Hill* v. *United States,* 368 U.S. 424; *Andrews* v. *United States,* 373 U.S. 334).

It is petitioner's contention that the use of the summary contempt procedure under Rule 42(a), Federal Rules of Criminal Procedure, where the court acts as the source of the questions put to a witness instead of remaining as an impartial judge, as authorized in *Brown* v. *United States, supra,* is improper. In the light of the recent decision in *United States* v. *Barnett,* 376 U.S. 681, the rule in *Brown* v. *United States* should be reconsidered. Until the questions raised in the *Barnett* case were considered by this Court there appeared to be no occasion for the Court to reexamine the use of summary contempt procedures in the present type of situation.

It is submitted that the use of summary contempt procedures in situations of this kind is unwarranted and improper, and that *Brown* v. *United States, supra,* should be overruled. It is to be noted that petitioner complained before the district court that he was being tried in secret (74a), and unlike *Levine* v. *United States, supra,* he demanded a public hearing. The record of this case discloses

that he was not granted a public hearing, or any hearing worthy of the name.

3. In view of the fact petitioner was sentenced to one year's imprisonment prior to this court's decision in *United States* v. *Barnett, supra,* the court of appeals, after this case had been argued, asked counsel for their views for the possible impact of the *Barnett* decision on the sentence imposed in this case. Petitioner urged that all sentences in excess of those imposed for petty offenses required trial by jury and the procedural safeguards set forth in the Fifth and Sixth Amendments to the Constitution. In approving the sentence of one year the court of appeals referred to two purported distinctions between this case and *Barnett.* The court stated that petitioner's "contempt was committed in the presence of the court and the contempt proceeding was undertaken prior to compliance with the court's order". (See Appendix A, *infra,* p. 7a). We submit these distinctions are artificial and are really not in harmony with the objectives of the three opinions of this Court in the *Barnett* case, which question in all contempt cases the power of the courts tc impose punishments in excess of that for petty or trivial offenses, where trial by jury is not afforded. In *District of Columbia* v. *Clawans,* 300 U.S. 617, 627, this Court held "that irrespective of the severity of the offense, the severity of the penalty imposed might entitle a defendant to the right of trial by jury." This Court held in *Barnett* that the alleged contemnors were not entitled to trial by jury as a matter of constitutional right. However, it noted that even in the absence of such right the sentence that is imposed might require trial by jury of the offense charged. Under the circumstances, the propriety of using summary contempt procedures where imprisonment in excess of that

fixed for petty offenses under 18 USC § 1 is imposed, should be reviewed by this court.

4. It would also seem that a sentence of one year's imprisonment imposed in a summary contempt proceeding is constitutionally impermissible. A defendant in a criminal case is entitled to the safeguards of the Fifth and Sixth Amendments to the Constitution, relating to indictment, trial by jury and the effective assistance of counsel, as well as other procedural safeguards, where he receives a sentence of one year's imprisonment. In this case petitioner was deprived of all these rights, prior to the speedy imposition of the one year's sentence. His counsel was not even permitted to have the issues raised in this case made the subject of a proper adversary hearing before the court adjudged petitioner in contempt and immediately sentenced him (40a-41a).

It is quite clear from the opinion of Mr. Justice Black in *Barnett* that "a majority of the Court would now overrule *Green* (*Green* v. *United States*, 356 U.S. 165) in part, by holding that if a criminal contempt charge is tried without allowing the defendant a jury trial, punishment is constitutionally limited to that customarily meted out for 'petty offenses'" (376 U.S. 681, 727). If this Court would now so hold, then, in any event, the sentence of one year imposed against petitioner is not constitutionally permissible and should be vacated as void in law.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

MOSES POLAKOFF,
Attorney for Petitioner

DANIEL H. GREENBERG
Of Counsel

September 21, 1964.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 394—September Term, 1963.

(Argued April 7, 1964 Decided July 22, 1964.)

Docket No. 28524

UNITED STATES OF AMERICA,

Appellee,

—v.—

AL HARRIS,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and SMITH, *Circuit Judges.*

Appeal from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York, Edward C. McLean, *J.*, sitting without a jury.

Affirmed.

NEAL J. HURWITZ, Assistant U. S. Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York and John E. Sprizzo, Assistant U. S. Attorney, New York, N. Y., on the brief), *for appellee.*

Appendix A—Opinion of United States Court of Appeals

MOSES POLAKOFF, New York, N. Y. (Daniel H. Greenberg, New York, N. Y. on the brief), *for appellant.*

LUMBARD, *Chief Judge*:

Al Harris appeals from a judgment of conviction for contempt of court entered in the United States District Court for the Southern District of New York arising out of his refusal to answer certain questions put to him before a grand jury in the Southern District on the ground that he might thereby incriminate himself. We agree with the district court that inasmuch as Harris received immunity for his testimony pursuant to the provisions of the Federal Communications Act, his refusal to answer constituted contempt of court.

Harris was summoned to appear before the grand jury by a subpoena returnable on August 7, 1963.[1] The subpoena stated that the grand jury was investigating alleged violations of the Federal Communications Act, 47 U. S. C. §§203, 501. On that date, Harris appeared and stated his name

[1] Harris first appeared before the grand jury on July 31, 1963, pursuant to a subpoena which stated that the grand jury was investigating possible violations of the general conspiracy statute, 18 U. S. C. §371. Harris refused to answer the questions propounded to him, although the government's counsel advised him that the Federal Communications Act, 47 U. S. C. §409 (*l*), afforded him immunity. Later that day the grand jury and the government's counsel appeared before Judge McLean, who, after a reading of the record of the grand jury's proceedings, directed that Harris appear again the following morning. At that time Judge McLean heard argument on whether §409(*l*) afforded Harris immunity. At Judge McLean's suggestion that the government lay a proper foundation for the grant of immunity, the subpoena here in question was issued stating that the grand jury was investigating possible violations of the Federal Communications Act.

but declined to answer any of the other questions propounded to him, which concerned a telephone call from Florida to New York City for the purpose of promoting an illegal dice game in Florida. Later that morning, the grand jury and the government's counsel appeared before Judge McLean in the presence of Harris and his attorney. After hearing argument, Judge McLean directed the parties to appear before him again the following morning. At that time, he directed Harris to answer the questions put to him, on the ground that he had received immunity under the provisions of the Communications Act, 47 U. S. C. §409(*l*), and therefore could not incriminate himself by answering. When Harris once again refused to answer, the grand jury and the government's counsel again appeared before Judge McLean to ask his assistance. Judge McLean directed Harris to take the witness stand, propounded the same questions to him once more, and, when Harris again refused to answer, adjudged Harris in criminal contempt and sentenced him to one year's imprisonment. From this judgment and sentence Harris appeals.

Harris relies principally on the claim that the grand jury was in fact investigating alleged violations of the Anti-Racketeering Act, 18 U. S. C. §1952, rather than alleged violations of the Communications Act. Inasmuch as the anti-racketeering statute makes no provision for the grant of immunity to a prospective witness, as does the Communications Act, Harris maintains that no immunity attached to him, and he could therefore not constitutionally be compelled to testify under penalty of contempt of court. We do not agree.

In its investigation of possible violations of the Federal Communications Act, the grand jury may well unearth evidence of violations of other criminal provisions as well. But the likelihood of such a development provides no support for Harris' position. If the statutory provision under which the grand jury is proceeding extends immunity to the prospective witness, that immunity extends to all testimony thus compelled insofar as that testimony bears a substantial relation to the subject matter of the immunity provision. See *Heike* v. *United States,* 227 U. S. 131, 142-43 (1913). Moreover, the witness compelled to testify in a federal grand jury enjoys immunity as well from the use of that testimony by the prosecutorial agencies of state governments. *Murphy* v. *Waterfront Commission of New York Harbor,* United States Supreme Court, No. 138 October Term, 1963, June 15, 1964. Thus the fact that his testimony may be relevant not only to the specific provision upon which the grand jury's investigation is based but as well to other criminal provisions poses no dilemma for the prospective witness. The crucial question, therefore, is whether the specific immunity provision of the Communications Act was applicable to Harris' questioning.

Section 409(*l*) of Title 47 of the United States Code extends immunity for testimony given "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of [the Federal Communications Act]." Harris contends that he should have been granted the right to summon several witnesses, including one or two members of the grand jury, to establish that the grand jury's investigation did not pertain to alleged viola-

tions of the Communications Act. We do not agree. The extent in general to which a witness may inquire into the subject matter of a grand jury investigation is severely circumscribed, in light of the secrecy in which grand jury proceedings have traditionally been held. *United States* v. *Levine*, 267 F. 2d 335, 336-37 (2 Cir. 1959). See *Blair* v. *United States*, 250 U. S. 273 (1919). In any event, we find that the government sufficiently established that the grand jury's investigation fell within the confines of §409(*1*).

First, the August 7 subpoena explicitly stated that the grand jury was engaged in investigation of possible violations of provisions of the Communications Act. Second, the government's counsel represented to the court that the grand jury was investigating possible violations of the Communications Act. Finally, the questions themselves revealed a substantial link with those sections of the Communications Act which prohibit any person from causing a telephone company to violate any provision of the Act. Cf. *In re Bart*, 304 F. 2d 631, 637 (D. C. Cir. 1962).

Harris maintains that under no circumstances could the activities inquired into in the grand jury have constituted a violation of the Communications Act. Rather, he suggests, these activities could at best have constituted violations of the general anti-racketeering statute, 18 U. S. C. §1952. In support of its own position the government weaves the following argument: The Federal Communications Act makes unlawful the act of any person causing a telephone company to extend telephone services not provided for in its tariffs, 47 U. S. C. §§203, 501. The tariff of the American Telephone & Telegraph Company, joined

in by the Southern Bell Telephone & Telegraph Company, states that telephone service shall "not be used for an unlawful purpose." Thus, the government contends, when an individual uses telephone facilities for an unlawful purpose he causes the telephone company to extend to him services not provided for in its tariffs and consequently to violate the Communications Act.

On facts quite analogous to those here presented, the Third Circuit held that the government had sufficiently established the necessary link of a possible violation of the Communications Act, on the theory which the government here proffers. *Marcus* v. *United States,* 310 F. 2d 143 (3 Cir. 1962), cert. denied, 372 U. S. 944 (1963). See also *United States* v. *Testa,* 326 F. 2d 730 (3 Cir.), cert. denied, 32 U. S. L. Week 3297 (Feb. 24, 1964). Moreover, the government refers us to indictments which have been returned in other districts charging violations of the Communications Act under similar circumstances. Finally, we must recognize that the scope of the grand jury's investigation is not limited to the specific questions put to Harris. Indeed, further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises, and corruption in connection therewith, which would certainly constitute a violation of the Communications Act, at least to the extent of any participation by telephone company representatives. On balance, we hold, as did the Third Circuit, that the government has established that the grand jury investigation here is a proceeding "based upon or growing out of [an] alleged violation of [the Federal Communications Act]."

We also find no merit in Harris' claim of procedural irregularities in the adjudication of his contempt and in his sentencing. Contrary to his charges, the record establishes that the contempt proceeding was conducted in open court. Moreover, Judge McLean did not err in treating Harris' refusal to answer the questions after court direction to do so as a summary contempt under Rule 42(a) of the Federal Rules of Criminal Procedure. *Brown* v. *United States,* 359 U. S. 41 (1959); *Levine* v. *United States,* 362 U. S. 610 (1960). Accordingly, we affirm the judgment of conviction of the district court.

We note that some members of the United States Supreme Court indicated their view, in a footnote to *United States* v. *Barnett,* 376 U. S. 681, 695 n. 12 (1964), that punishment of a criminal contempt by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses. Inasmuch as the Court explicitly regarded this statement as *dictum,* and inasmuch as Harris' contempt was committed in the presence of the court and the contempt proceeding was undertaken prior to compliance with the court's order, in both of which respects this case differs from *Barnett,* we uphold the power of the district judge to impose a sentence of one year's imprisonment, although such a sentence is in excess of that provided for petty offenses. 18 U. S. C. §1. See *Levine* v. *United States,* 362 U. S. 610 (1960); *Brown* v. *United States,* 359 U. S. 41 (1959).

The judgment of the district court is affirmed.

APPENDIX B

Opinion of United States Court of Appeals on Petition for Rehearing and Motion to Stay the Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

AL HARRIS,

Appellant.

MOSES POLAKOFF, New York, N. Y.,
for Appellant.

The petition for rehearing is denied.

The motion to stay the mandate is granted on the terms and conditions provided in Rule 28(c) of the Rules of this Court.

J. E. L.
L. P. M.
J. J. S.
U.S.C. JJ.

25 August 1964.

Appendix B—Opinion of United States Court of Appeals on Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

AL HARRIS,

Appellant.

MOSES POLAKOFF, New York, N. Y.,
for Appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

Aug. 25, 1964.

APPENDIX C

Constitutional Provisions, Statutes and Rule Involved

Constitution of the United States

AMENDMENT V

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: . . .

TITLE 18, UNITED STATES CODE

§ 1. OFFENSES CLASSIFIED

Notwithstanding an Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

Appendix C—Constitutional Provisions, Statutes and Rule Involved

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

TITLE 47, UNITED STATES CODE

§ 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

Appendix C—Constitutional Provisions, Statutes and Rule Involved

§ 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both.

§ 409. Hearings—Filing of initial decisions; exceptions

* * * * *

Self-incrimination

(1) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the

ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 42(a)

Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.